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DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 47-749

ISBRANDTSEN CO., INC.,

Plaintiff,

against

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE, A/S J. LUDWIG MOWINCKELS REDERI, BLACK DIAMOND STEAMSHIP CORP., COMPAGNIE GENERALE TRANSATLANTIQUE, COMPAGNIE MARITIME BELGE, CUNARD WHITE STAR, LTD., ELLERMAN'S WILSON LINE, LTD., DAMPSKIBSSELSKABET AF 1912 A/S, N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPPIJ, UNITED STATES LINES COMPANY, WATERMAN STEAMSHIP CORPORATION, LYKES BROS. STEAMSHIP CO., INC., SOUTH ATLANTIC STEAMSHIP LINE, INC.,

Defendants,

UNITED STATES MARITIME COMMISSION,

Intervenor

JURISDICTIONAL STATEMENT

A/S J. Ludwig Mowinckels Rederi, Black Diamond Steamship Corp., Compagnie Generale Transatlantique, Compagnie Maritime Belge, Cunard White Star, Ltd., Dampskibsselskabet af 1912 A/S, N. V. Nederlandsch-Amerikaansche Stoomvaart Maatschappij, United States Lines

Company, Waterman Steamship Corporation, and South Atlantic Steamship Line, Inc., defendants-appellants, as members of one or both of the two Conferences above named, having presented this day their petition for appeal, now file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the order in question, and should exercise such jurisdiction in this case.

(a) The appeal herein is from an order entered January 13, 1949 granting, after notice and hearing, an interlocutory injunction, made and entered by a District Court of the United States specially constituted under Sec. 2284 of Title 28, United States Code. Sec. 1253 of said Title 28 provides that a direct appeal to the Supreme Court of the United States may be taken from such an order made by such specially constituted District Court.

(b) The Federal statute involved is the Shipping Act, 1916, Secs. 801, *et seq.* of Title 46, United States Code. The only section of said statute, the validity of which, or of U. S. Maritime Commission Action thereunder, has been questioned by plaintiff is Sec. 15 thereof (46 U. S. C. 814). The pertinent provisions of said section are as follows:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between

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ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

• • • • • • •

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, [Anti-Trust Law] and amendments and Acts supplementary thereto."

Sec. 14A and Sec. 29 of the Shipping Act (46 U. S. C. Sec. 813, 828) although not attacked before the District Court are also involved.

• • • • • • •

(c) The order appealed from was made and entered on January 13, 1949.

(d) The application for appeal was presented on February 10, 1949.

(e) The appeal is directed to setting aside the aforesaid injunction. The injunction in the order restrains appellant carriers from putting into effect a "contract-non-contract" rate system, so-called, whereby shippers who contract with said carriers, within certain limitations, to ship their goods in trans-Atlantic trade eastbound and westbound exclusively by the vessels of said carriers, who are members of Conferences approved by the Maritime Commission, receive the benefit over a period of agreed rates which are lower than the open rates, so-called, applied by said carriers to "non-contract" shipments (here the indicated difference in rates was 20%).

The plaintiff, not a member of either of the two Conferences of which defendant carriers are members, secured a temporary restraining order along substantially the same lines as in the temporary injunction contemporaneously with the filing of its complaint October 28, 1948. Said complaint charged that the "contract-non-contract" rate system was invalid as matter of law, and therefore could not lawfully be approved by the Maritime Commission under Sec. 15 of the Shipping Act, 1916 (46 U. S. C. 814); and that if such approval was allowable under said section, the same would then be unconstitutional as an unlawful delegation of power to said Commission. The plaintiff contended that the Maritime Commission's *ex parte* approvals of Conference agreements purporting to authorize a "contract-non-contract" rate system were unlawful and improper and therefore should be set aside by the Court.

The Court found that said Sec. 15 contained a provision for cancellation or modification by the Commission of any agreement previously approved by it.

Appellant carriers contended before the Court that con-

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tracts with shippers were different from agreements between carriers in the nature of conferences requiring approval by the Commission; that said contracts were in the nature only of rate practices not subject to approval in advance by the Maritime Commission, although subject to the jurisdiction of the Commission in a complaint proceeding or a proceeding initiated by itself, wherein the Commission would determine the lawfulness or unlawfulness of the "contract-non-contract" rate practice according to the circumstances and facts developed in the particular proceeding.

In the interest of clarification, we may point out that the "contract-non-contract" rate system has been in fairly regular and constant use in greater or lesser degree for many years dating from before 1914 when the so-called Alexander Committee Report (H. R. Doc. 805, 63rd Cong., 2nd Sess. [1914]) was issued and became the basis on which the Shipping Act, 1916, was formulated; in that report said rate practice was specifically dealt with in an approving sense, and not disapproved. The approved Conference agreements to which the appellants are parties provide for admission of other qualified carriers on application; any carrier upon admission is entitled to full participation in the rate contracts. This "contract-non-contract" rate system, although in suspense until recently because of the World War, is practiced by most of the approved Conferences in ocean foreign trade, has in many instances been upheld by the Maritime Commission, and historically has had the approbation of most shippers.

Although the Court decided that plaintiff must first exhaust its remedy before the Maritime Commission in an adversary proceeding in advance of court determination, nevertheless it issued a temporary injunction against appellants, December 20, 1948, pending determination by the Commission, and without any specific finding of irreparable damage. The complaint and related affidavits made no al-

legations adequate to support a finding of irreparable damage to plaintiff. The opinion of the Court only recites "the plaintiff would be gravely prejudiced" by institution of the contract rate system pending the Commission's decision.

The injunction was conditioned on plaintiff filing a complaint before the Commission within 20 days from the entry of the Court's order, January 13, 1949. Plaintiff filed its complaint with the Commission February 1, 1949, whereupon the Commission immediately caused the same to be served on appellants with notice requiring answer within 15 days from date of receipt of the complaint. Appellants will file their answers as thus required, whereupon plaintiff's complaint will be at issue before the Commission.

Copies of the Court's opinion dated December 20, 1948, and order of January 13, 1949, including Findings of Fact and Conclusions of Law, are appended hereto.

Appellant carriers contend that the Court was without power to issue the temporary injunction; and that the same is unduly prejudicial to them and is causing and will cause them irreparable damage in respect of their regular and legitimate activities and interests. They further contend that said injunction is an interference in the nature of prejudgment with the proceedings directed to be had before the Maritime Commission, both as concerns appellants and said Commission, and as concerns also good order in lawfully established and recognized priorities as between courts and regulatory bodies according to the subject-matter involved. Appellants further contend that the Court had no right to "exercise of discretion," because of the primary jurisdiction of the Maritime Commission which the Court itself recognized; and more especially because the Maritime Commission, being the lawful guardian of public interest in such matters, had promptly intervened and opposed issuance of the injunction as contrary to the public interest.

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Appellants represent that the question involved is of manifestly vital importance not only to them but likewise to all other interests, whether carriers or shippers, participating in ocean transportation in foreign trade. The question is obviously most important also as concerns regulatory bodies, not only to the Maritime Commission as directly affected here, but likewise to the Interstate Commerce Commission, Civil Aeronautics Board, and other Commissions, agencies of Congress, whose activities could be adversely affected by advance court action of the general nature exemplified in this present case. *U. S. Nav. Co.* v. *Cunard S. S. Co., et al.*, 284 U. S. 474; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540; and *Board* v. *Great Northern Ry. Co.*, 281 U. S. 412, together with other cases that can be cited, appear to support the foregoing.

(f) The following decisions of the Supreme Court of the United States, among others, are believed to sustain the jurisdiction of said Court on a direct appeal to review the order here in question: *Board* v. *Great Northern Ry.*, 281 U. S. 412; *Isbrandtsen-Moller Co.* v. *U. S.*, 300 U. S. 139; *United States* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774.

Respectfully submitted,

ROSCOE H. HUPPER,
BURTON H. WHITE,
Attorneys for Defendants-Appellants.

February 10, 1949.

APPENDIX "A"

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before:

FRANK, Circuit Judge, and RIFKIND and KAUFMAN, District Judges.

APPEARANCES:

JOHN J. O'CONNOR, Esq.,
WILLIAM L. McGOVERN, Esq.,
Attorneys for Plaintiff.

JOHN F. X. McGOHEY, Esq.,
Attorney for the United States,
WALTER K. BENNETT, Esq., Special Assistant to the Attorney General, Antitrust Division and
JOSEPH E. McDOWELL, Esq., Special Assistant to the Attorney General.

PAUL D. PAGE, JR., Esq.,
GEORGE F. GALLAND, Esq.,
Attorneys for U. S. Maritime Commission.

BURLINGHAM, VEEDER, CLARK & HUPPER, Esqs.,
Attorneys for Defendant Carriers.
ROSCOE H. HUPPER, Esq., of Counsel.

TOMPKINS, BOAL & TOMPKINS, Esqs.,
Attorneys for Lykes Bros. Steamship Co., Inc.
ARTHUR M. BOAL, Esq., of Counsel.

This is a suit brought by Isbrandtsen Steamship Co., to enjoin and set aside so much of the orders and approvals of the United States Maritime Commission approving two Conference Agreements, No. 4490-6, dated Jan. 2, 1948, and No. 7920-1, dated August 24, 1948, as authorize imposition

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by defendant steamship carriers and Conferences of "contract" and "non contract" rates. Defendants are two Conferences and their steamship line members and the United States of America, a statutory defendant. 46 U. S. C. A. § 830; 28 U. S. C. § 2322. The Special Assistant to the Attorney General, who appeared for the United States, stated,

> "The Department of Justice cannot defend the actions of the Maritime Commission involved in this suit for the reason that to do so would be inconsistent with the position taken by the Department of Justice on behalf of the United States in a pending antitrust action against the Far East Conference and a number of its member lines, which action is now pending in the District Court of the United States for the District of New Jersey. The Department of Justice, therefore, stands aside for the purpose of this hearing."

The Maritime Commission has intervened. 28 U. S. C. § 2323.

On plaintiff's motion for a temporary restraining order and a temporary injunction restraining defendant Conferences and steamship lines "• • • from carrying out their announced intention and plan of instituting their exclusive patronage contract system on November 1, 1948 and thereafter retaliating against any shipper who patronizes plaintiff • • •", a temporary restraining order was granted ex parte, and the motion heard before a statutory three judge court. 46 U. S. C. A. § 830; 28 U. S. C. § 2325; 28 U. S. C. § 2284. It is that motion, and defendant carriers' motion to dismiss,[1] which are now to be decided.

It appears without substantial dispute that

1. The defendant steamship lines, foreign and domestic, are members of one or both of two Conferences, the North Atlantic Continental Freight Conference and the Continental North Atlantic Freight Conference, hereafter called

---

[1] This motion was formerly made subsequent to the hearing, but presents the same issue which was argued on plaintiff's motion.

the Eastbound Conference and the Westbound Conference, respectively. These Conferences are rate-fixing associations of common carriers engaged, respectively, in the East and West bound carriage of goods across the Atlantic to and from east coast United States ports.

2. Plaintiff is an American flag "independent" engaged in competition with the Conference lines on these routes.

3. The Eastbound Conference agreement was first approved by the Commission under Sec. 15, of the Shipping Act, 46 U. S. C. A. § 814, on August 25, 1935, and thereafter from time to time approved as amended, to and including January 2, 1948. The original Eastbound agreement No. 4490 provided that "The Conference may provide specific contract and non-contract rates * * * and the permanent Chairman and/or Secretary is hereby empowered to negotiate and execute such contracts as may be authorized by the Conference".

4. Although this agreement permitted the Conference to charge those shippers who would contract to use Conference lines exclusively a tariff less than that charged other shippers, in fact, only in rare instances and with reference to a very few commodities were such rate differentials established heretofore.

5. On January 2, 1948, the Commission approved by order Agreement No. 4490-6 which recited:

> "Inasmuch as certain Steamship Lines heretofore members of the North Atlantic Continental Freight Conference (Agreement No. 4490 approved under Section 15 of the Shipping Act on August 24, 1935, as amended) have withdrawn from said Conference, the remaining members are continuing said Conference as hereby agreed by them to be modified and amended * * *."

6. Neither the original Westbound Conference Agreement, No. 7000, approved February 16, 1940, and as amended approved, No. 7000-5, on May 7, 1948, nor Agreement No. 7920, approved July 1, 1947, between the French

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North Atlantic Westbound Freight Conference members and the Continental/North Atlantic Westbound Freight Conference members, whereby they agreed mutually to maintain similar tariffs on cargoes of Belgian, Dutch or French origin, made mention of contract/non-contract rates, but the latter was modified by Agreement No. 7920-1 to provide for mutual imposition of each other's contract or non-contract rates, as might be applicable in any case, to cargo of such origin, and this agreement was approved by the Commission on August 24, 1948.

7. In approving these agreements the Commission followed its established practice of acting without holding adversary hearings.

8. Pursuant to the approved Conference agreements, the defendant steamship lines, through their Conferences, are presently about to require all shippers to contract to employ Conference lines exclusively on pain of being charged 20% higher tariffs if they fail so to contract. Once having contracted, any shipper who breaches by shipping goods via an independent non-Conference line will be required to pay to the Conference a penalty of double the contract rate applicable to the goods so shipped, and will thereafter be denied the lower contract rates.

9. Plaintiff and its predecessors have been engaged in the North Atlantic carriage since 1931, and the institution of the proposed exclusive patronage dual tariff system would greatly injure its business as an independent carrier.

RIFKIND, D. J.

We are all in agreement that a temporary injunction should issue to maintain the status quo pending further proceedings to adjudicate the legality of the Conference agreements and the action contemplated pursuant thereto. It may be that the "exclusive patronage" provisions are prohibited by 46 U. S. C. A. § 812[1-a] and that the Commis-

[1-a] Section 14 of the Shipping Act, 46 U. S. C. A. § 812, prohibits deferred rebates and retaliation by discriminating or unfair methods against a shipper because such shipper has patronized any other carrier.

sion is powerless to approve such provisions under 46 U. S. C. A. § 814. Very considerable doubt upon such a holding is thrown by *Swayne & Hoyt, Ltd.*, v. *U. S.*, 1937, 300 U. S. 297, 306-7 and note 3, and by the legislative history of the statute, H. R. Doc. No. 805, 63rd Cong., 2nd Sess., 1914, 287-292.

But we need not decide that question now. The statute is not very explicit in its provision of an administrative remedy. It does, however, provide, 46 U. S. C. A. § 814, that the Commission may cancel or modify any agreement "* * * whether or not previously approved by it * * *", and for fifteen years the Commission has followed a procedure for reviewing on its own motion, Pacific Coast European Conference Agreement, 1948, 3 U. S. M. C. 11, and for hearing complaints concerning agreements previously approved by it.

Cf. *Olsen* v. *Blue Star Line, Ltd.*, 1941, 2 U. S. M. C. 529;

Rawleigh v. *Stoomvart*, 1933, 1 U. S. S. B. 285.

That procedure has not yet been availed of by plaintiff. We should not at this stage pass on the validity of the agreements before the Commission, in accordance with its established procedure, has had an opportunity to pass thereon in an adversary proceeding.

But were the defendant carriers to institute their exclusive patronage system pending the Commission's decision upon such a proceeding, the plaintiff would be gravely prejudiced. Since the Commission disclaims the power to afford temporary relief, and the equitable power of the court to preserve the status quo to protect the rights of all concerned has not been withdrawn by statute,[2] an injunction as prayed should issue, conditioned on the plaintiff's diligent prosecution before the Commission of a complaint

[2] In West India F. & S. Co., Inc. *v.* Seatrain Lines, Inc., C. C. A. 2, Docket No. 21126, Dec. No. 81, Nov. 5, 1948, the Court of Appeals sustained an injunction granted with the Commission's approval on the theory that the Commission itself lacked power to grant relief pending its determination on a formal complaint. Cf. 28 U. S. C. § 2324; 5 U. S. C. A. § 1009.

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challenging the validity of the agreements. The defendant carriers' motion to dismiss the action is denied.

Dated, New York, N. Y., December 20th, 1948.

JEROME H. FRANK,
United States Circuit Judge;
SIMON H. RIFKIND,
United States District Judge;
SAMUEL H. KAUFMAN,
United States District Judge.

APPENDIX "B"

Order Granting Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on plaintiff's motion for a preliminary injunction and upon consideration thereof and the pleadings and affidavits filed herein, and the Court's opinion, dated December 20, 1948, and filed herein, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The defendant steamship lines, foreign and domestic, are members of one or both of two Conferences, the North Atlantic Continental Freight Conference and the Continental North Atlantic Freight Conference, hereafter called the Eastbound Conference and the Westbound Conference, respectively. These conferences are rate-fixing associations of common carriers engaged, respectively, in the East and West bound carriage of goods across the Atlantic to and from east coast United States ports.

2. Plaintiff is an American flag "independent" engaged in competition with the Conference lines on these routes.

3. The Eastbound Conference agreement was first approved by the Commission under Sec. 15 of the Shipping Act, 46 U. S. C. A. Sec. 814, on August 24, 1935, and thereafter from time to time approved as amended, to and including January 2, 1948. The original Eastbound agreement No. 4490 provided that "The Conference may provide specific contract and non-contract rates * * * and the permanent Chairman and/or Secretary is hereby empowered to negotiate and execute such contracts as may be authorized by the Conference."

4. Although this agreement permitted the Conference to charge those shippers who would contract to use Conference lines exclusively a tariff less than that charged other shippers, in fact, only in rare instances and with reference to a very few commodities were such rate differentials established heretofore.

5. On January 2, 1948, the Commission approved by order Agreement No. 4490-6 which recited:

> "Inasmuch as certain Steamship Lines heretofore members of the North Atlantic Continental Freight Conference (Agreement No. 4490 approved under Section 15 of the Shipping Act on August 24, 1935, as amended) have withdrawn from said Conference, the remaining members are continuing said Conference as hereby agreed by them to be modified and amended * * *."

6. Neither the original Westbound Conference Agreement, No. 7000, approved February 16, 1940, and as amended approved, No. 7000-5, on May 7, 1948, nor Agreement No. 7920, approved July 1, 1947, between the French North Atlantic Westbound Freight Conference members and the Continental/North Atlantic Westbound Freight Conference members, whereby they agreed mutually to maintain similar tariffs on cargoes of Belgian, Dutch or French origin, made mention of contract/non-contract rates, but the latter was modified by Agreement No. 7920-1 to provide for mutual imposition of each other's contract or non-contract rates, as might be applicable in any case, to cargo of such origin,

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and this agreement was approved by the Commission on August 24, 1948.

7. In approving these agreements the Commission followed its established practice of acting without holding adversary hearings.

8. Pursuant to the approved Conference agreements, the defendant steamship lines, through their Conferences, are presently about to require all shippers to contract to employ Conference lines exclusively on pain of being charged 20% higher tariffs if they fail so to contract. Once having contracted, any shipper who breaches by shipping goods via an independent non-Conference line will be required to pay to the Conference a penalty equal to twice the amount of freight that would have been payable under the contract in respect of the shipment constituting the violation, and will thereafter be denied the lower contract rates.

9. Plaintiff and its predecessors have been engaged in the North Atlantic carriage since 1931, and the institution of the proposed exclusive patronage dual tariff system would greatly injure its business as an independent carrier.

Conclusions of Law

1. The court should not at this stage pass on the validity of the agreements before the Commission, in accordance with its established procedure, has had an opportunity to pass thereon in an adversary proceeding.

2. Were the defendant carriers to institute their exclusive patronage system pending the Commission's decision upon such a proceeding, the plaintiff would be gravely prejudiced.

3. To preserve the status quo, an injunction as prayed should issue, conditioned on the plaintiff's diligent prosecution before the Commission of a complaint challenging the validity of the agreements.

4. Defendant carriers' motion to dismiss the action should be denied.

WHEREFORE, it is hereby

Ordered that the prayer of the plaintiff for a Preliminary Injunction be, and it hereby is, granted, on condition that plaintiff shall within twenty days from the entry of this order, file and thereafter diligently prosecute before the United States Maritime Commission a complaint challenging the validity of the Conference Agreements numbered 4490-6 and 7920-1. And it is further

Ordered that, pending the filing of said complaint and its consideration, and the filing and publishing of reports, decisions and orders of the United States Maritime Commission, and its examiners and agents, on and pertaining to said complaint to be filed before said Commission, or until further order of this Court, defendants North Atlantic Continental Freight Conference and Continental North Atlantic Westbound Freight Conference, and the defendant steamship lines, members of said two Conferences, their agents, servants, employees, attorneys and all persons in active concert or participation with them, are hereby restrained from taking any steps to execute or effectuate any exclusive patronage contracts with shippers, heretofore or hereafter entered into, or to put into effect the contract rate system, or to compel, induce or persuade shippers in said North Atlantic trades to execute or effectuate such contracts, or enter into such contracts with shippers, whereby the shipper, directly or indirectly, agrees to effect all his transportation requirements exclusively by means of the member lines of the two defendant Conferences, under penalty of being assessed freight rates higher than the rates currently prevailing, if he patronizes plaintiff, or any other penalty; and it is further

Ordered that, pending the filing of said complaint by plaintiff and its consideration, and the filing and publishing of all reports, decisions and orders of the United States Maritime Commission, and its examiners and agents, on and pertaining to said complaint, or until the further order of this Court, the operation of those provisions of Conference Agreements numbered 4490-6 and 7920-1 purporting to authorize said Conferences to provide contract and non-contract rates shall be suspended; and it is further

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ORDERED that the motion, dated November 18, 1948, to dismiss the Complaint herein, filed by the defendant steamship lines herein, be, and the same hereby is, denied; and it is further

ORDERED that said Preliminary Injunction is hereby granted on condition that plaintiff, Isbrandtsen Co., Inc., continue in full force and effect, during the pendency of this Preliminary Injunction, the security heretofore given on the issuance of the Temporary Restraining Order herein. Nothing herein contained shall prejudice any defendant from applying to the court for an increase of the security hereby ordered upon proper showing.

Dated, January 7th, 1949.

/s/ JEROME N. FRANK
United States Circuit Judge
/s/ SIMON H. RIFKIND
United States District Judge
/s/ SAMUEL H. KAUFMAN
United States District Judge

SIRS:

PLEASE TAKE NOTICE that the within is a copy of an Order this day duly entered and filed in the office of the Clerk of the United States District Court for the Southern District of New York.

Dated, January 13th, 1949.

Yours, etc.,

JOHN J. O'CONNOR,
Attorney for Plaintiff
29 Broadway, New York, N. Y.

To

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Attorney for United States of America,
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4709 Department of Commerce Bldg.,
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TOMPKINS, BOAL & TOMPKINS, ESQS.,
Attorneys for Lykes Bros. S. S. Co.
116 John Street, New York City.

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FILED
MAR 16 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 622

A/S J. LUDWIG MOWINCKELS REDERI *et al.*
Defendants-Appellants

against

ISBRANDTSEN CO., INC.
Plaintiff-Appellee

APPLICATION TO TRANSFER TO SUMMARY DOCKET

BRIEF IN SUPPORT OF SAID APPLICATION, AND IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

ROSCOE H. HUPPER
BURTON H. WHITE
Counsel for Appellants
27 William Street
New York City

Dated: March 15, 1949.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 622

A/S J. LUDWIG MOWINCKELS REDERI
et al.
Defendants-Appellants

against

ISBRANDTSEN CO., INC.
Plaintiff-Appellee

APPLICATION TO TRANSFER TO SUMMARY DOCKET

Come now the appellants and hereby apply under Paragraph 5 of Rule 7 for transfer of this case to the Summary Docket, on the ground that the case is of such a character as not to justify extended argument.

Appellants annex hereto in support of their application their brief of this date pursuant to Rule 7 in opposition to appellee's Motion to Affirm.

Respectfully submitted,

ROSCOE H. HUPPER
BURTON H. WHITE
Counsel for Appellants
27 William Street
New York City

Dated: March 15, 1949.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 622

A/S J. LUDWIG MOWINCKELS REDERI
et al.
Defendants-Appellants

against

ISBRANDTSEN CO., INC.
Plaintiff-Appellee

BRIEF FOR APPELLANTS IN SUPPORT OF TRANSFER TO SUMMARY DOCKET, AND IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

On February 25, 1949 there was served on us by counsel for Isbrandtsen Co., Inc., appellee herein, a typewritten copy of a "Motion to Affirm", entitled in the United States District Court, Southern District of New York, moving this Court to affirm the judgment of the District Court [granting injunction] on the ground that no substantial purpose could be served by further argument in this cause, and stating certain contentions.

Said motion and the grounds stated therefor indicate a fairly complete misapprehension by appellee of the single simple issue on this appeal—vacation of the injunction—as set forth in the Jurisdictional Statement which is part of the record filed in this Court February 28, 1949. The December 20, 1948, opinion of the three judges of the District Court was published February 21, 1949, 81 F. Supp. 544.

I

Rate making functions and related facts are involved, not merely a law question.

Appellants seek reversal of that part of the District Court's order of January 13, 1949 which granted a temporary injunction against them in respect of their *rate methods* and "contract rate practice" in trans-Atlantic trades. Appellee had contended that the same would be competitively prejudicial to it. The District Court granted the injunction notwithstanding that by its opinion and order the Court recognized, and indeed made it a condition, that administrative procedure before the United States Maritime Commission must be invoked and exhausted before any determination on the merits could be made by a Court.

The Maritime Commission under date of March 8, 1949 denied a "Motion for Expedited Procedure" made by Appellee in the proceeding [U. S. M. C. Docket 684], instituted before it by appellee pursuant to the District Court's said condition. The Commission's denial order shows that important questions of fact, as well as of law, are involved in said proceeding, in which appellants have duly filed answer. A true copy of the Commission's said order as served on us March 9, 1949 is annexed hereto (p. 14).

Appellee contended before the District Court, likewise before the Maritime Commission, that the subject matter is a mere question of law concerning alleged lack of power in the Commission to have approved certain Conference agreements under Sec. 15 of the Shipping Act, 1916, (46 U. S. C. Sec. 814) in so far as they contained what (according to appellee's contention) purported to be authority for the contract rate practice.

The District Court referred to *Swayne & Hoyt Ltd. et al.* v. *United States*, 300 U. S. 297, also to the legislative history of the statute, as throwing "very considerable doubt upon such a holding" [i. e. lack of Commission au-

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thority to approve]; saying "we need not decide that question now". The Court concluded on this point by saying: "We should not at this stage pass on the validity of the agreements before the Commission, in accordance with its established procedure, has had an opportunity to pass thereon in an adversary proceeding". Thus the Court left the matter open on questions both of law and of fact under the several regulatory provisions of the Shipping Act, 1916, as amended (46 U. S. C. sec. 801, *et seq.*). This disposition conforms to the March 8, 1949 order of the Commission just above referred to.

II

There was no "order" before the District Court for its review.

We emphasize that the District Court did not have before it for review or other action any "order" of the Commission, or anything assimilable thereto. See *United States* v. *Los Angeles R. R.*, 273 U. S. 299; *C. and S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103.

An example of the Conference Agreement provisions in controversy is one from Paragraph (3) in "North Atlantic Continental Freight Conference Agreement as approved August 24, 1935 (Ex. A to Complaint), reading as follows:

> "The Conference may provide specific contract and non-contract rates in an effort to stabilize rates and permit of forward trading for the common good of the Members and Exporters and the permanent Chairman and/or Secretary is hereby empowered to negotiate and execute such contracts as may be authorized by the Conference."

Although appellee's contentions purport to be based chiefly on other more recent documents, the same in substance or in practice refer back directly or indirectly to the

foregoing, as concerns Eastbound traffic. The Westbound provisions are less definite.

The contract-non-contract system is an ocean freight rate practice subject to regulation by the Commission under pertinent provisions of the Shipping Act. The validity of the practice in this, that, or the other situation is not dependent upon advance approval by the Commission under Section 15 of that Act, although the validity of Conference agreements between ocean carriers is so subject in relation to exemption from prohibitions of the anti-trust laws. It would indeed be hardly possible for the Commission to approve in advance any contract rate practice as correct in every situation whatever. That question necessarily depends on the facts and circumstances of the particular case as the same shall be developed before the Commission, where shippers and carriers may present their views and arguments for consideration. The Commission is thus enabled to appraise and decide what is right and just not only for private interests but also as concerns the commerce of the United States in respect of the freight rate practice, activity or commercial proposition under attack or in issue before it. This has been indicated by the Commission in many cases, one of the later instances of which is *Pacific Coast European Conference Agreement,* U. S. M. C. Docket 648, decided January 12, 1948, 3 U. S. M. C. 11, wherein a fairly complete discussion with resultant determination on the "Contract Rate System" appears at pp. 14-19.

The *Swayne & Hoyt* case above referred to developed from the decision of United States Shipping Board Bureau in its Docket 294, *Gulf Intercoastal Contract Rates,* 1 U. S. M. C. 524, wherein the Secretary of Commerce reviewed the contract rate subject-matter and stated, p. 530: "Whether any such system is lawful is a question which must be determined by the facts in each case."

Both of these regulatory decisions on "contract rates" were cited to the District Court. Its opinion (81 F. Supp. at 546) refers to the footnote at 300 U. S. 307. Mr. Justice

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Stone at that page, notwithstanding affirmance, intimated a difference of opinion as to the correctness of the Secretary's determination against contract rates in the intercoastal trade. This circumstance adds emphasis to the exclusive nature of the Commission's jurisdiction.

III

Granting the injunction constituted prejudgment by the District Court.

The District Court's action in granting an injunction under the circumstances would thus appear to constitute a prejudgment on matters not within its province or jurisdiction. Not until after final action by the Commission has any District Court any jurisdiction in such matters, and then it is prescribed by Sec. 29 of the Shipping Act, 1916 (46 U. S. C. Sec. 828). The injunction order as entered interferes on its face with the broad powers granted to the Commission under said 1916 Act. Such unlawful exercise of jurisdiction by the Court is substantially an admonition to the Commission as to how it shall decide its Docket 684. This jurisdictional deviation prejudices the Commission in the free performance of its functions, and the rights and interests of appellants and appellee herein; also those of other carriers, likewise shippers, in the foreign commerce of the United States.

Thus the temporary injunction is not in aid of the administrative process but tends to impair the same.

The Commission intervened in the proceedings before the District Court, and vigorously opposed issuance of the injunction.

IV

There was no irreparable damage.

Further, the record is devoid of the slightest evidence or even probable indication that appellee had suffered or would suffer "irreparable damage" from appellants' contract rate practice. That practice was well known and not in any sense forbidden, but approved rather, when the H. R. Report on Shipping Affairs was issued in 1914 (H. R. Doc. 805, 63rd Congress, 2nd Sess. 1914).

Even had the District Court had any jurisdiction in the premises, it was thus forbidden to grant an injunction for lack of the inevitable condition, "irreparable damage". The Court contented itself with merely asserting that appellee "would be gravely prejudiced".

Since appellee contends that the Commission had no lawful power under Section 15 of the Shipping Act (46 U. S. C. Sec. 814) to approve the provisions of the Conference agreements in respect of contract rates, it might follow that appellee would, *on such an assumption*, be entitled to institute suit for triple damages under the Sherman Act (15 U. S. C. Sec. 15). That appellee has not taken or intimated taking any such step would suggest either that it has suffered no damages or that it has declined to avail itself of an open legal remedy. In either case no right to sue in equity for an injunction could exist. *Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588.

V

The District Court had no jurisdiction. The jurisdiction is solely that of the Maritime Commission.

The point presented by appellants to this Court is that the order for injunction should be reversed on the ground that the District Court had no jurisdiction or power.

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We do not here ask the Court to consider the merits of the contract rate matter in any respect whatsoever, regarding that as having been committed by law solely to the administrative action and decision of the Maritime Commission.

The present case is not different from that which was before this Court in *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 which came here also from the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit. The plaintiff carrier there sought an injunction against certain acts by other carriers upon the ground that the same violated the Shipping Act, 1916. This Court took the firm position that the question whether such acts violated the Shipping Act called for exercise of the primary exclusive jurisdiction of the regulatory agency to be exercised and exhausted before the Court could issue even a preliminary injunction. The District Court's issuance here of a preliminary injunction in advance of the prescribed specialized regulatory steps flies in the face of the *Cunard* decision. The District Court's action was not merely an abuse of discretion but was an infringement on and usurpation of the exclusive jurisdiction of the Maritime Commission.

That no injunction, either temporary or permanent, should issue where there has been a failure to exhaust a specific administrative remedy, is amply demonstrated by many decisions of this Court. *Aircraft & Diesel Equipment Corp.* v. *Hirsch, et al.*, 331 U. S. 752; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540; *Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Board* v. *Great Northern Ry.*, 281 U. S. 412.

See also *Wickwire Steel Co.* v. *New York Cent. & H. R. R. Co.*, 181 Fed. 316 (2d C. C. A. 1910); *Columbus Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 178 Fed. 261 (4th C. C. A. 1910); *Atlantic Coast Line R. Co.* v. *Macon Grocery Co.*, 166 Fed. 206 (5th C. C. A. 1909) aff'd. 215 U. S. 501.

The *Great Northern* decision, relating to the Interstate Commerce Commission, appears to have settled beyond cavil the law as we state it and to make academic any further consideration of the point. Mr. Chief Justice Hughes there said, 281 U. S. at 429:

> "When * * * the question arose as to the propriety of judicial action in granting injunctions * * * pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*."

At page 430 Chief Justice Hughes stated clearly the principles which forbid injunction in such case and then concluded:

> "It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

The conclusiveness of the prohibition is the more certain (if possible) in the case at bar in view of the remarks of Mr. Justice Sutherland in *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, at 485-86:

> "The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named act rests upon stronger ground, since the decisions of

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this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act."

VI

The cases cited by appellee do not support its motion to affirm.

The cases cited by appellee do not in the slightest degree sustain its motion to affirm. We now refer to said cases briefly:

General American Tank Car Corp. v. *El Dorado T. Co.*, 308 U. S. 422, involved no injunction but merely an action in assumpsit. This court held that the suit should not have been dismissed but held in abeyance until determination of the administrative proceeding. The point in that case is not present here. There is no appeal here from denial by the District Court of the November 18, 1948 motion to dismiss—patterned on that in the *Cunard* case. Granting of the relief now sought by appellants would not by itself result in dismissal of the District Court action. *El Dorado Oil Works* v. *U. S.*, 328 U. S. 12, merely reflects a later aspect of that case, and does not bear on any issue here.

Columbia Broadcasting System, Inc. v. *U. S.*, 316 U. S. 407, supports appellee's statement that a suit to review an order of the Federal Communications Commission is in equity. That is not contested, nor is it material. That case made a specific finding of "irreparable damage" not present here—notwithstanding that appellee's motion represents "irreparable damage" in several places. The

District Judges only said "gravely prejudiced", without specification or explanation.

In the *per curiam* decision in *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, there was a clear case of irreparable damage which would surely result from the enforcement of the tax statute claimed to be unconstitutional, inasmuch as the State statutes provided no remedy whereby restitution of taxes paid could be enforced. The court properly found that apart from injunctive relief "the plaintiff will be remediless".

Alabama v. *U. S.*, 279 U. S. 229, was a suit to set aside an Interstate Commerce Commission order, which established intrastate rates on fertilizers, etc. "and was made after a full inquiry" (p. 230). The District Court had denied application for a preliminary injunction pending final hearing in that Court, and this Court affirmed the decree. The difference between that case and ours is so apparent as hardly to require special comment. There, the Interstate Commerce Commission had made full inquiry, and made its determination by an "order"—notwithstanding which the Court refused an injunction. Here, the matter in complaint had not even been submitted to the Maritime Commission so that no "inquiry" by it of any kind could be made, much less any "order" subject to court review. Even had there been any jurisdictional basis for the injunction issued in the case at bar, the propriety of issuance by the District Court would have been exceedingly doubtful, in view of the general public interest in the commercial subject-matter, affecting the rights of shippers to contract, as well as carriers. See *Yakus* v. *U. S.*, 321 U. S. 414, 440.

The hollowness of appellee's contentions is attested by the very cases it relies on. In sum they emphasize at least three necessary prior conditions of an injunction, which appellee's case at bar so conspicuously lacks: (1) investigation and hearing by the Commission; (2) resulting determination by the Commission in the form of an order; (3) clear showing of specified irreparable damage.

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Conclusion

We conclude that the propositions raised by appellee on its "Motion to Affirm" are so unsubstantial as not to justify extended argument; and that the clarity of the appellants' right to have the injunction dissolved is such that extended argument ought not to be necessary in support of the same.

Believing that the matter is of the character that might well be transferred to the summary docket in the interest of expedition, we have prefixed to this brief a formal application to this effect.

Respectfully submitted,

Roscoe H. Hupper
Burton H. White
Counsel for Appellants
27 William Street
New York City

Dated: March 15, 1949.

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ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 8th day of March A. D., 1949

SERVED
MAR 9 1949
U. S. MARITIME COMMISSION

NO. 684

ISBRANDTSEN COMPANY, INC.

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, ET AL.

Complainant having filed Motion for Expedited Procedure, moving that the full Commission rather than one or more examiners preside at the hearing herein, to hear arguments and to receive briefs on the issue of law involved; and respondents having filed a reply thereto; and due consideration having been given; and it appearing that important questions of fact as well as of law are involved in this proceeding;

It is ordered, That the motion be, and it is hereby, denied; and

It is further ordered, That the hearings herein be conducted by the Commission's Office of Trial Examiners in accordance with the applicable rules of procedure.

By the Commission

(SEAL)

/s/ R. L. McDonald
Asst. Secretary

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FILED
MAR 2 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 622

A/S J. LUDWIG MOWINCKELS REDERI, ET AL.,
Appellants,

vs.

ISBRANDTSEN CO., INC., THE UNITED STATES OF AMERICA AND UNITED STATES MARITIME COMMISSION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

JOHN J. O'CONNOR,
WILLIAM L. McGOVERN,
Counsel for Appellees.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 47-749

ISBRANDTSEN CO., INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, ET AL.,

Defendants

MOTION TO AFFIRM

On February 10, 1949, the District Court granted defendant steamship conferences and lines members thereof permission to appeal to the Supreme Court of the United States from an order of said Court dated January 13, 1949. This motion to affirm on the ground that the questions presented by such appeal are so unsubstantial as not to need further argument is made pursuant to Paragraph 3 of Rule 12 and Paragraph 4 of Rule 7 of the Rules of the Supreme Court of the United States.

Preliminary Statement

On January 2, 1948 and August 24, 1948 the United States Maritime Commission, without notice or hearing, issued its orders approving United States Maritime Commission Agreements Nos. 4490-6 and 7920-1 authorizing shipping

conferences in the North Atlantic trade to employ the contract/non-contract exclusive patronage rate system. Pursuant to the approved Conference agreements, the defendant steamship lines, through their Conferences, announced that effective November 1, 1948 they were about to require all shippers to contract to employ Conference lines exclusively on pain of being charged 20% higher tariffs if they failed so to contract. Once having contracted, any shipper who breached by shipping goods via an independent non-Conference line would be required to pay to the Conference a penalty equal to twice the amount of freight that would have been payable under the contract in respect of the shipment constituting the violation, and would thereafter be denied the lower contract rates.

Immediately upon receiving notice from shippers that they were being solicited to sign exclusive patronage contracts and that after November 1, 1948 they would be unable longer to patronize Isbrandtsen Co., Inc., as an independent American Flag carrier, Isbrandtsen Co., Inc., instituted this action in the United States District Court pursuant to the provisions of the Shipping Act of 1916, as amended, 46 U. S. C. 830, the Urgent Deficiencies Act of 1913, as amended, 28 U. S. C. Sec. 2284, 2321-2325, and the Administrative Procedure Act of 1946, 5 U. S. C. 1009, to enjoin, set aside, annul and suspend orders and approvals of the United States Maritime Commission dated January 2, 1948 approving Conference Agreement designated by the Commission as Conference Agreement No. 4490-6, and August 24, 1948 approving Conference Agreement designated by the Commission as Conference Agreement No. 7920-1 on the ground that such Commission orders and approvals purport to authorize the defendant steamship lines concertedly to coerce shippers in the North Atlantic trade to patronize defendant steamship lines exclusively and to retaliate against shippers in such trade who patronize plaintiff.

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The Commission orders of January 21, 1948 and August 24, 1948 were issued pursuant to Section 15 of the Shipping Act of 1916 (46 U. S. C. 814), under which the Commission is authorized to approve and immunize, to a limited extent, under the Anti-trust Laws conferences of shipping lines. Section 15 provides that "The Commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds * * * to be in violation of this chapter, and shall approve all other agreements modifications, or cancellations."

However, Section 14 of the Shipping Act provides that "No common carrier by water shall directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country * * * Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

In the District Court, Isbrandtsen Co., Inc., contended that the Commission's purported authorizations to the defendant Conferences to employ the exclusive patronage contract system in the North Atlantic-European Continent East and Westbound trade were absolutely null and void as exceeding the authority conferred on the Commission by statute. Plaintiff contended that this conclusion necessarily followed from (a) the fact that the contract/non-contract system explicitly, on its face, retaliates and discriminates against a shipper who patronizes a non-conference carrier, and (b) the fact that the Shipping Act of 1916 explicitly, on its face, forbids any carrier to "retaliate against any shipper * * * or resort to other discriminating or unfair

methods, because *such shipper has patronized any other carrier* or *for any other reason*" (46 U. S. C. 812; emphasis supplied).

The District Court concluded that it should not finally pass on the validity of the challenged agreements until the Commission had had an opportunity to pass upon the validity of the agreements in an adversary proceeding (Conclusion of Law 1). However, the Court also found that "were the defendant carriers to institute their exclusive patronage system pending the Commission's decision upon such proceeding, the plaintiff would be gravely prejudiced" (Conclusion of Law 2). Therefore, in view of the fact that the Commission lacked power to prevent the carriers from inflicting irreparable injury upon the plaintiff pursuant to the approved agreements, the District Court, in order to preserve the status quo pending further Commission proceedings, temporarily suspended the Conference Agreements and temporarily enjoined defendant carriers from effectuating their threat to institute the exclusive patronage system (Conclusion of Law 3).

Questions On Appeal

While the defendant carriers have made five assignments of error, upon analysis it will be found that the appeal presents only three questions:

1) Did the District Court lack jurisdiction temporarily to restrain defendants from engaging in certain acts and practices until further administrative proceedings could be had before the Commission in an adversary proceeding.

2) Did the District Court properly make an appropriate finding that the plaintiff would be irreparably injured pending reference to further administrative proceedings, and

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3) Did the District Court abuse its discretion in issuing a temporary injunction to maintain the status quo and to protect the plaintiff from irreparable injury pending further Commission proceedings.

No Substantial Question Presented

1. Even a cursory reading of the District Court's opinion and order reflects that the Court entertained no doubt of its jurisdiction to review the Commission's orders but elected to stay its hand until the Commission should hold the adversary hearings which the Commission had failed to provide prior to its approvals.

Not only did this action constitute an appropriate forbearance to exercise acknowledged judicial power in deference to the integrity of the administrative process, but it represented precisely the type of judicial restraint that the Supreme Court has enjoined upon lower courts in similar circumstances involving administrative proceedings. *General American Tank Car. Corp.* v. *El Dorado T. Co.*, 308 U. S. 422, 60 S. Ct. 325 (1939); *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 66 S. Ct. 843 (1946). As the Supreme Court observed in the first El Dorado case:

> When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but as in Mitchell Coal & Coke Co. *v.* Pennsylvania R. R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.

2. In the course of its opinion the District Court found:

> Plaintiff and its predecessors have been engaged in the North Atlantic carriage since 1931, and the institution of the proposed exclusive patronage dual tariff system would greatly injure its business as an independent carrier.

That the exclusive patronage contract rate system would irreparably damage plaintiff's business as an independent American Flag carrier is obvious from the face of the contract agreement. Indeed, the Conference agreement and exclusive patronage contracts tendered shippers pursuant thereto leave no doubt that the system was explicitly designed to coerce shippers to cease dealing with plaintiff and must necessarily result in irreparable injury to the plaintiff.

However, in addition to the showing made on the face of the contracts themselves, plaintiff tendered the Court, in the form of affidavits, the expert views of plaintiff's Vice-President in charge of traffic, who described in detail the harmful effects the threatened institution of the exclusive patronage contract rate system was even then working on plaintiff's custom. The affidavits tendered were supported by photostatic copies of letters from shippers testifying to their satisfaction with the service of the plaintiff in the past and expressing their regret at the necessity of ceasing to patronize plaintiff after November 1. Defendant's only response to this showing was that plaintiff could avoid injury by joining the Conference!

Under the circumstances, the Court was compelled to conclude:

> Were the defendant carriers to institute their exclusive patronage system pending the Commission's decision upon such a proceeding, the plaintiff would be gravely prejudiced.

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On the face of the record here, the defendant is clearly unable to discharge the burden on appeal of showing that the Findings and Conclusions of the District Court were "clearly erroneous" (Rule 52, Rules of Civil Procedure).

3. A proceeding to review a Commission order is a "plenary suit in equity" (*Columbia Broadcasting Co.* v. *U. S.*, 316 U. S. 407). In the circumstances here, the District Court was clearly impelled to issue a temporary injunction to preserve the status quo pending the further administrative proceedings required by the court's order. Indeed, in a case such as this, had the District Court failed to issue an injunction, the Supreme Court might well have ordered such an injunction to protect the plaintiff from irreparable injury. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 49 S. Ct. 256.

In any case, it is familiar law that the application for an interlocutory injunction is addressed to the sound discretion of the trial court and that an order either granting or denying such an application will not be disturbed by an Appellate Court unless the injunction was improvidently issued. *Alabama* v. *United States*, 279 U. S. 229, 49 S. Ct. 266. Certainly, the issuance of the temporary injunction here could hardly be considered an abuse of the admitted discretion residing in the District Court to preserve the equities before it.

Conclusion

Under the circumstances, it can scarcely be contended that the defendants-appellants can discharge the burdens with which the rules of the Supreme Court and applicable principles of law charge them on this appeal. Therefore, plaintiff submits that no substantial purpose could be served by further argument in this cause, and respectfully moves

the Supreme Court to affirm the judgment of the District Court herein.

Respectfully submitted,

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WILLIAM L. MCGOVERN,
1707 H Street, N. W.,
Washington, D. C.,
Attorneys for Plaintiff.

(1392)

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No. 622. A/S J. LUDWIG MOWINCKELS REDERI ET AL. *v.* ISBRANDTSEN CO., INC. ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The appeal is dismissed. *Roscoe H. Hupper* and *Burton H. White* for appellants. *John J. O'Connor* and *William L. McGovern* for appellees. Reported below: 81 F. Supp. 544.